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No. 90-96

In the Supreme Court of the United States

OCTOBER TERM, 1990

FREDERICK A. SIEGERT, PETITIONER

v.

H. MELVYN GILLEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. In a *Bivens* action based on a federal official's alleged malice, once the official has raised the defense of qualified immunity, may the court require the plaintiff to support his claim with more than conclusory allegations in order to proceed with the litigation?

2. In this *Bivens* action based on a federal official's response to a reference request by the plaintiff's prospective employer, is the official entitled to the defense of qualified immunity?

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 5a-25a) is reported at 895 F.2d 797. The decision of the district court (Pet. App. 27a-52a) is reported at 692 F. Supp. 1406.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. A petition for rehearing was denied on April 16, 1990. Pet. App. 2a-4a. The petition for a writ of certiorari was filed on July 13, 1990, and was granted on October 15, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

Rules 8, 9, and 56 of the Federal Rules of Civil Procedure are set forth in the appendix to petitioner's brief, Br. App. 2a-8a.

STATEMENT

1. Petitioner is a clinical psychologist who was employed at St. Elizabeth's Hospital (then a federal government facility in Washington, D.C.) from November 1979 to October 1985. During 1985, petitioner was a supervisory psychologist in the hospital's Godding/Noyes Division, which treated patients needing behavior therapy. J.A. 14, 19; Pet. App. 7a-8a. Beginning in February 1985, petitioner "had to take a considerable amount of medical leave time off from work." J.A. 19. Although the hospital's records noted that petitioner was "AWOL" during that period, *i.e.*, absent without leave, petitioner alleges that those records were inaccurate, since he has "been fully compensated for that time." J.A. 19; see pp. 7-8, *infra*.

Petitioner alleges that respondent—the director of the Godding/Noyes Division and his immediate supervisor during 1985—"resented [his] being away from work for the length of time [he] was[,] since [his] absence created additional burdens for [respondent]." J.A. 20. Petitioner concedes that he "resist[ed] * * * [respondent's] attempts to modify some aspects of the behavior modification program that had been in operation for several years," claiming that respondent "knew almost nothing about behavior therapy." J.A. 20. Petitioner further alleged that respondent "resented [that] resistance." J.A. 20; see also J.A. 5-6 (Compl. ¶ 6).

In August 1985, Betty Humphrey, Director of the Godding/Noyes Division, notified petitioner that the Department of Health and Human Services (the agency in charge of the hospital) was proposing to fire him. Humphrey told petitioner that "his proposed removal was based upon his inability to report for duty in a dependable and reliable manner, his failure to comply with supervisory directives, and cumulative charges of absence without approved leave." J.A. 15; see J.A. 21. After a meeting with hospital administrative personnel, petitioner resigned from his position on October 1, 1985, before the proposed removal became final. In so doing, petitioner avoided having a "letter of 'removal' " placed in his personnel file. J.A. 21; see Pet. App. 33a.

Soon after his resignation from St. Elizabeth's, petitioner began working as a clinical psychologist at a United States Army hospital in Bremerhaven, West Germany. J.A. 20-21. In order to treat patients at the hospital, petitioner needed to receive "credentials" from the Army Medical Department Credentials Committee. As part of that process, petitioner submitted a "Credential Information Request Form" to St. Elizabeth's Hospital, requesting that the hospital "send [to petitioner's current hospital supervisor in West Germany] all information on job performance and the privileges granted while [he] was a member of [the] staff." Pet. App. 55a.[1] Dr. Stammeyer, the Director of Psychology at St. Elizabeth's, referred petitioner's request to respondent, because petitioner "had been under

[1] Petitioner's supervisor at the Bremerhaven Army hospital was Colonel William Smith, the Deputy Commander for Clinical Services, who also served as chairman of that hospital's Credentials Committee. Pet. App. 34a.

[his] supervision when [petitioner] worked at [the hospital]." J.A. 15.

On October 23, 1985, in response to petitioner's request, respondent notified the Army by letter that "he could not recommend [petitioner] for privileges as a psychologist." J.A. 6 (Compl. ¶ 10). In that letter, respondent wrote that he "consider[ed] [petitioner] to be both inept and unethical, perhaps the least trusthworthy individual I have supervised in my thirteen years at [St. Elizabeth's Hospital]." J.A. 6 (Compl. ¶ 11).[2] In late November, the Army Credentials Committee told petitioner that since "reports about him were 'extremely unfavorable,' * * * the committee was * * * recommending that [petitioner] not be credentialed." J.A. 7 (Compl. ¶ 12). At this time, petitioner first learned of respondent's recommendation letter. J.A. 7 (Compl. ¶ 13); see Pet. App. 35a.

As a result of the Committee's notification, petitioner hired an attorney to assist him in presenting his case to the Army Commander. In January 1986, petitioner "was credentialed" by the Commander. J.A. 7 (Compl. ¶ 15).[3] In July 1986, petitioner left his position at the Bremerhaven Army Hospital and "was hired as a clinical psychologist at another army hospital in Stuttgart, West Germany." J.A. 7 (Compl. ¶ 17) When petitioner reported

[2] Respondent's letter was made part of the record as an exhibit attached to the affidavit of Dr. Stammeyer. See J.A. 15. On respondent's motion, the district court placed the letter under seal. Order, *Siegert* v. *Gilley*, No. 86-3234 (D.D.C. Nov. 24, 1987); see Pet. App. 34a.

[3] According to petitioner, "[n]otwithstanding the Commander's action, * * * [his Bremerhaven supervisor] threatened to 'get' [petitioner] in any event, and otherwise made [his] work environment difficult, unpleasant, and extremely stressful." J.A. 7 (Compl. ¶ 16). The supervisor's "attitude * * * had been formulated by [respondent's] statement [about petitioner's previous work performance at St. Elizabeth's]." J.A. 7 (Compl. ¶ 17).

for work in Stuttgart, he "was literally turned away and was told that [he] was not wanted because of what they had heard about [him] from Bremerhaven personnel." J.A. 23; see J.A. 7 (Compl. ¶ 18); Pet. App. 35a.

Petitioner thereafter returned to the Bremerhaven Army hospital, where the Army again undertook to review petitioner's credentials. J.A. 7-8 (Compl. ¶ 19). According to petitioner, in the fall of 1986, the Army ultimately granted him credentials to treat adults, but revoked his credentials to treat children. J.A. 22. Petitioner filed administrative appeals with the Office of the Surgeon General to obtain those credentials. During that time, petitioner "worked in the medical library at the Army base hospital." J.A. 22. In December 1987, the Surgeon General denied petitioner's claims. Soon thereafter, petitioner's "federal service employment [was] terminated." J.A. 23; see Pet. App. 35a.[4]

2. In November 1986, petitioner brought this federal court action against respondent, claiming that respondent's letter had caused him to lose his post as a psychologist at the Bremerhaven Army Hospital, and had rendered him unable to obtain other appropriate employment in the field. Pet. App. 35a; J.A. 23. Petitioner alleged that the statements in the letter were "defamatory *per se* and * * * untrue," J.A. 8 (Compl. ¶ 22), and that respondent had made those statements "maliciously and in bad faith," J.A. 8 (Compl. ¶ 21). Relying in part on

[4] Petitioner's complaint, filed in November 1986, alleged only that he was "waiting for a decision from [the] Credentials Committee as to whether [his] credentials will be revoked." J.A. 8 (Compl. ¶ 20). In an amended complaint filed in April 1987 petitioner offered a more complete description of the credentials review process. Amended Compl. ¶ 20. On remand from the court of appeals, the district court dismissed the action in May 1990, without ever ruling on petitioner's motion for leave to file the amended complaint under Fed. R. Civ. P. 15(a).

Bivens v. *Six Unknown Named Narcotics Agents*, 403 U.S. 388 (1971), petitioner sought $4 million in damages against respondent in his individual capacity, contending that respondent—"by maliciously and in bad faith publishing a defamatory *per se* statement * * * which [he] knew to be untrue, or with reckless disregard as to whether it was true or not," J.A. 9 (Compl. ¶ 30)—had violated his rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. See J.A. 4, 8, 9 (Compl. ¶¶ 1, 21, 30).[5]

Respondent thereafter filed a motion to dismiss or in the alternative for summary judgment. Respondent contended that petitioner's factual allegations, even if true, did not

[5] Petitioner also asserted pendent common law tort theories of defamation, intentional infliction of emotional distress, interference with contractual relations, and interference with prospective advantage, J.A. 4, 9-11 (Compl. ¶¶ 2, 31-38).

Respondent sought dismissal of those pendent claims, contending, among other arguments, that he was entitled to absolute immunity from such common law torts. In view of its decision ordering discovery on petitioner's *Bivens* claim, see p. 8, *infra*, the district court did not address respondent's asserted defense. Pet. App. 51a-52a. In May 1989, while respondent's appeal was pending, respondent filed in the district court a motion for reconsideration. In that motion, respondent notified the court that, in view of the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No.. 100-694, 102 Stat. 4563-4567, the United States "is being substituted as the exclusive defendant for [petitioner's] common law tort claims." Resp. Mem. in Support of Mot. to Reconsider at 1-2, *Siegert* v. *Gilley*, No. 86-3234 (D.D.C.); see 28 U.S.C. 2679(d)(1).

The court of appeals did not expressly address petitioner's common law claims, but having determined that his *Bivens* claim failed, reversed the district court's order and remanded with instructions to dismiss the entire case. Pet. App. 19a; see *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Petitioner does not challenge the propriety of dismissing his pendent common law claims if this Court otherwise upholds the court of appeals' judgment.

make out a violation of any constitutional right. Respondent also asserted the defense of qualified immunity, contending that petitioner's allegations did not state a violation of any "clearly established" constitutional right within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Pet. App. 30a-31a, 36a.[6]

In opposition to respondent's motion, petitioner submitted his affidavit stating, among other things, that "[i]t is my understanding that [respondent] resented my being away from work for the length of time I was since my absence created additional burdens for him." J.A. 20. In further explaining the basis for his allegation that respondent acted with malice, petitioner stated that

> [h]ad [respondent] made a simple inquiry of the Department of Labor's Workman's Compensation Board, for example, he would have discovered that [petitioner] had been fully compensated for the periods during which [respondent] apparently considered him "AWOL" and which apparently was the cause of [respondent's] belief that [petitioner] was "untrustworthy," *inter alia*. That [respondent] failed

[6] Respondent submitted an affidavit of Dr. Stammeyer, see J.A. 14-16, which included as a sealed exhibit a copy of respondent's recommendation letter, see note 4, *supra*, and a statement of material facts not in issue under Local Rule 108(h), see J.A. 12-13.

Respondent also contended that petitioner's action should be dismissed in light of the administrative remedies available to him. See *Bush* v. *Lucas*, 462 U.S. 367 (1983). The district court rejected that defense, concluding that "[t]here is no requirement in the law for [the court] to relegate [petitioner] to an administrative forum, if one actually exists, at this early stage of this litigation." Pet. App. 51a. The court of appeals declined to consider the issue, concluding that its appellate jurisdiction "is limited to the sole question of the district court's rejection of [respondent's] claim of qualified immunity." *Id.* at 10a.

> to make such inquiry * * * and instead responded to a credentials status inquiry in the way he did show malice, a clear lack of good faith and unreasonableness.

Pet. Mem. in Support of Opp. to Resp. Mot. to Dis. at 12 (footnote omitted), *Siegert* v. *Gilley*, No. 86-3234 (D.D.C. (filed May 8, 1987).[7]

3. In December 1987, the district court issued an order declining to "decide this matter on a Summary Judgment motion at this time." Pet. App. 54a. Instead, the court determined that it "would like to see a more developed record," and therefore ordered "a limited amount of discovery," *ibid.* In particular, the court directed that petitioner may depose respondent and Colonel Smith, and then respondent may depose petitioner.[8]

Respondent filed a motion for reconsideration, asking the court to stay further discovery pending disposition of his qualified immunity claim. In June 1988, the district court denied that motion, determining that respondent's "motion to dismiss, or in the alternative, for summary judgment, must be denied at this time." Pet. App. 31a. The court held that petitioner's factual allegations were sufficient to state a due process claim, because it was well established at the time of the events that "a common law defamation is transformed into a constitutional deprivation of liberty when the government is the source of the defamatory allegations and the resulting 'stigma' involves

[7] Petitioner also submitted under Local Rule 108(h) a statement of material facts in issue. See J.A. 17-18. At that time, petitioner also filed an amended complaint, together with a motion for leave to file it. See note 4, *supra*.

[8] Petitioner had not contended that respondent's motion for summary judgment should be denied pending further discovery. Nor had petitioner filed a motion under Fed. R. Civ. P. 56(f) for additional discovery.

'some tangible change of status vis-a-vis the government.' " *Id.* at 44a (quoting *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092, 1108-1109 (D.C. Cir. 1985)). The court therefore directed the parties to proceed with the previously ordered discovery. Pet. App. 52a.

4. The court of appeals reversed and remanded with instructions that the case be dismissed. Pet. App. 5a-25a. The court first determined that, to the extent petitioner's *Bivens* action was premised on allegations of improper conduct irrespective of subjective intent, the allegations did not state a claim for violation of any clearly established constitutional right. *Id.* at 14a-16a. The court pointed out that the fact that petitioner and his new employer, the Army, had solicited the information provided by respondent constituted a significant distinction from existing case law.[9] And the court recognized that a former employer responding to a request for a job reference would have a qualified privilege at common law. *Id.* at 15a-16a.

The court of appeals then turned to petitioner's "central contention * * * that [respondent] wrote the letter with bad faith and malice." Pet. App. 16a. Assuming "that such bad faith motivation would suffice to make [respondent's] actions in writing the letter a violation of [petitioner's clearly established] constitutional rights," *id.* at 16a-17a, the court held that petitioner's allegations of improper motivation were insufficient to overcome respondent's assertion of qualified immunity. The court explained that where, as here, improper purpose is an essential component of a plaintiff's constitutional tort action,

[9] See *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) (discharge of government employee accused of misconduct by supervisors); *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984) (former supervisor sent unsolicited references to prospective employer).

the plaintiff must adequately allege specific, direct evidence of illicit intent in order to defeat the defendant's motion to dismiss or motion for summary judgment asserting qualified immunity. *Id.* at 11a-14a, 17a-18a.

Here, the court determined, petitioner's allegations did not satisfy that "heightened pleading standard." Pet. App. 19a. The court stated that

> [t]he complaint's shortcoming is most evident in its allegations that [respondent] had acted in bad faith when he described [petitioner] as inept, unethical, and untrustworthy. * * * It merely asserts (and reasserts) that in making the statement he "knew [it] to be false or [made it] with reckless disregard as to whether it was true."

Id. at 17a (citations omitted). And the court determined that petitioner's affidavit did not

> add anything more tangible to the record than the assertions that prior to the time [respondent] became his supervisor, he had received exemplary job performance ratings, had never had his professional integrity questioned, and that his resistance to certain changes [respondent] wished to make in St. Elizabeth's programs was the source of [respondent's] hostility towards him.

Ibid.

Chief Judge Wald dissented in part. Pet. App. 19a-25a. Although she agreed with the majority that the district court's finding of no qualified immunity should be vacated, *id.* at 19a, she concluded that petitioner's factual allegations were sufficient "to warrant limited discovery before a judicial resolution of the qualified immunity issue," *id.* at 24a.[10]

[10] The court of appeals later denied a petition for rehearing, together with a suggestion of rehearing en banc. Pet. App. 2a-3a. On remand from the court of appeals, the district court dismissed petitioner's action in its entirety on May 7, 1990. Pet. App. 1a.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed.

1. The remedy recognized by this Court in *Bivens* and related cases is an important means of vindicating constitutional rights. At the same time, the Court has recognized that the protection afforded to public officials by the doctrine of qualified immunity is essential to the vigorous and effective performance of governmental functions. For that reason, the Court has emphasized that the scope of this immunity embraces more than a defense to personal liability in damages; it is also an "entitlement * * * [to] *immunity from suit*." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

The full measure of protection afforded by the immunity doctrine therefore calls for an official's claim of immunity to be resolved as early as possible in the litigation. And since the doctrine protects official conduct unless that conduct violates a "clearly established" constitutional right, a plaintiff must support his allegations of wrongdoing—once a defense of immunity has been raised—with more than conclusory allegations. Because the Court has made it clear (in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)) that the test for determining the availability of immunity is an objective one, not turning on the official's motivation, it could well be that a *Bivens* remedy does not lie when the official's state of mind is an essential element of the violation itself. Lower courts have not taken this view, however; they have struck the balance by insisting that in such a case, the raising of an immunity defense requires—for the litigation to continue—that the plaintiff support his allegation of improper motive with sufficient

precision and factual specificity to raise a genuine issue as to the lawfulness of the official's conduct. If such suits are to be allowed, we believe that such an approach is necessary to maintain the viability of the immunity defense and to safeguard the values it implements.

The Federal Rules of Civil Procedure do not preclude the imposition of such a requirement. First, the mandate of Rule 8—that a plaintiff make a "short and plain statement of the claim" showing that he is "entitled to relief"—means in this context that once the defendant has raised his immunity defense, the plaintiff is not "entitled to relief" (or indeed to proceed with the litigation at all) unless he can make a sufficient showing to overcome the immunity defense.

Second, while the provision in Rule 9(b) allowing malice or other condition of mind to be "averred generally" permits the plaintiff to plead the defendant's motivation in general terms in his original complaint, the landscape changes significantly once an immunity defense is raised and the defendant moves for judgment. If, as here, the motion is one for summary judgment, the adequacy of the plaintiff's showing is judged not under Rule 9 but under the summary judgment provisions of Rule 56. Moreover, whether the defendant's motion is one for dismissal (under Rule 12) or for summary judgment (under Rule 56), the substantive scope of the protection afforded by the immunity doctrine requires a specific factual showing in order for the litigation to proceed. To the extent that the provisions of Rule 9 are seen as inconsistent with this requirement, the Rules Enabling Act itself, 28 U.S.C. 2072(b), stipulates that the rule must give way to the demands of the substantive law underlying the immunity doctrine.

In this case, petitioner's conclusory allegations of malice are not sufficient to overcome respondent's claim of qualified immunity. Petitioner relies on the following: his assertion that respondent criticized his work when he received exemplary evaluations from others; an inaccurate portrayal of the solicitation received from petitioner's new employer; claimed "conflicts" with respondent on the proper conduct of the work; and an unsupported allegation that respondent "resented" petitioner's absence for several months. As the court of appeals recognized, none of these assertions, singly or in combination, constitutes a sufficient showing of malice to allow the litigation to proceed.

2. Since respondent acted in the performance of a discretionary function, his conduct is plainly within the scope of the qualified immunity defense. Providing information to a present or prospective employer about the job performance of a subordinate employee necessarily entails judgments and discretion, and petitioner does not (and cannot) allege that respondent acted contrary to any statutory or regulatory directive.

ARGUMENT

I. IN A *BIVENS* ACTION BASED ON A FEDERAL OFFICIAL'S ALLEGED MALICE, ONCE THE OFFICIAL HAS RAISED THE DEFENSE OF QUALIFIED IMMUNITY, THE COURT MAY REQUIRE THE PLAINTIFF TO SUPPORT HIS CLAIM WITH MORE THAN CONCLUSORY ALLEGATIONS IN ORDER TO PROCEED WITH THE LITIGATION

A. The Doctrine Of Qualified Immunity Mandates Prompt Resolution Of The Asserted Defense In Order To Maintain The Balance Between Remedying Violations Of Federal Law And Safeguarding Effective Government

1. In *Bivens* v. *Six Unknown Named Narcotics Agents*, 403 U.S. 388 (1971), this Court "established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an

award of monetary damages against the responsible federal official." *Butz* v. *Economou*, 438 U.S. 478, 504 (1978); see *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). As the Court has explained, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982); *Bivens*, 403 U.S. at 410 ("For people in Bivens' shoes, it is damages or nothing.") (Harlan, J., concurring in the judgment).

Nonetheless, in fashioning a limited form of damages remedy, the Court has been mindful of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974); see also *Barr* v. *Matteo*, 360 U.S. 564, 569-576 (1959); *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845). The need for such substantive protection from suit stems from

> two mutually dependent rationales: (1) the injustice * * * of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer, 416 U.S. at 240 (footnote omitted). As a result, the Court's "decisions consistently have held that government officials are entitled to some form of immunity from suits for damages." *Harlow*, 457 U.S. at 806; see, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

As this Court has explained,

> [i]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Scheuer, 416 U.S. at 242. Such immunity, the Court has emphasized, "is not a badge of honor or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr* v. *Matteo*, 360 U.S. at 572-573. To deny such protection altogether would "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950)).

2. With respect to the substantive immunity accorded "executive officials in general," the Court has made plain that "qualified immunity represents the norm." *Harlow*, 457 U.S. at 807; see, *e.g.*, *Butz*, 438 U.S. at 504-508. That immunity shields "government officials performing discretionary functions * * * from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

Such protection, however, is "not limited to liability for money damages." *Forsyth*, 472 U.S. at 526. To the contrary, this Court has stressed that the substantive doctrine provides immunity from suit itself, namely, "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Ibid.* (quoting *Harlow*, 457 U.S. at 816). In other words, "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like

an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Forsyth,* 472 U.S. at 526.

For that reason, this Court has made clear that the substantive protection of qualified immunity "should be resolved at the earliest possible stage of a litigation." *Anderson* v. *Creighton,* 483 U.S. 635, 646 n.6 (1987). Indeed, until the "threshold immunity question is resolved, discovery should not be allowed." *Harlow,* 457 U.S. at 818. As this Court recently reiterated, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Forsyth,* 472 U.S. at 526; see *Creighton,* 483 U.S. at 646 n.6 (if the complaint alleges actions a reasonable officer could have believed lawful, then the case should be dismissed "prior to discovery").

B. Once The Federal Official Raises The Defense Of Qualified Immunity, The Plaintiff Must Support His *Bivens* Action With More Than Conclusory Allegations In Order To Proceed With The Litigation

1. Under the doctrine of qualified immunity recognized by this Court, once a government official asserts that defense, the plaintiff in a *Bivens* action must either make a sufficient factual showing to negate the immunity or face dismissal of the action. This Court's explanation of the scope of the substantive protection—"[t]he entitlement [to] an *immunity from suit,*" *Forsyth,* 472 U.S. at 526—mandates such a straightforward approach. See *Elliott* v. *Perez,* 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring).

This Court has stressed that a plaintiff's allegations in a *Bivens* action must not only state a claim under the Constitution, but must also "state a claim of violation of clearly established law." *Forsyth,* 472 U.S. at 526. If a plaintiff's

allegations—as stated in the complaint or as supplemented in response to the immunity defense—do not state such a cognizable claim, then "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Ibid.* "Until this threshold immunity question is resolved," the Court has instructed, "discovery should not be allowed." *Harlow,* 457 U.S. at 818. Indeed, the Court has recognized that "many [*Bivens*] cases may be disposed of without the necessity of pretrial discovery proceedings." *Cleavinger* v. *Saxner,* 474 U.S. 193, 208 (1985).

To ensure that the purposes of qualified immunity are effectuated, the lower courts have consistently required that once immunity is asserted, the plaintiff must set forth his allegations with sufficient precision and factual specificity to negate the claim of immunity.[11] Such a requirement enables the court to determine the threshold issue of qualified immunity before the defendant is forced to endure the burdens of discovery and further proceedings. Requiring factual specificity therefore protects the defendant's "entitlement [to] an *immunity from suit,*" *Forsyth,* 472 U.S. at 526, and furthers the Court's directive that "[u]ntil [the] threshold immunity question is resolved, discovery should not be allowed," *Harlow,* 457 U.S. at 818. Indeed, to allow general or otherwise conclusory

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[11] See, *e.g., Sawyer* v. *County of Creek,* 908 F.2d 663, 665-667 (10th Cir. 1990); *Dunbar Corp.* v. *Lindsey,* 905 F.2d 754, 763 (4th Cir. 1990); *Nieto* v. *San Perlita Indep. School Dist.,* 894 F.2d 174, 177-178 (5th Cir. 1990); *Nuclear Transport & Storage, Inc.* v. *United States,* 890 F.2d 1348, 1355 (6th Cir. 1989), cert. denied, 110 S. Ct. 1807 (1990); *Brown* v. *Frey,* 889 F.2d 159, 170 (8th Cir. 1989), cert. denied, 110 S. Ct. 1156 (1990); *Hobson* v. *Wilson,* 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

allegations to satisfy the threshold immunity inquiry would transform the "guarantee of immunity into a rule of pleading." *Creighton,* 438 U.S. at 639.

2. Similarly, a requirement of heightened factual specificity obtains in *Bivens* cases in which the defendant's subjective motivation is an element of the plaintiff's cause of action. In *Harlow,* the Court recognized that since allegations of an official's improper state of mind lead to "[j]udicial inquiry into subjective motivation," permitting such allegations to defeat qualified immunity would expose government officials to "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." 457 U.S. at 817. "Inquiries of this kind," the Court pointed out, "can be peculiarly disruptive of effective government." *Ibid.* Accordingly, the Court framed the substantive immunity protection "essentially in objective terms," *id.* at 819, and made plain that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," *id.* at 817-818. In other words, as part of the substantive protection accorded government officials, the Court "replac[ed] the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Creighton,* 483 U.S. at 645.

Harlow thus forecloses a plaintiff from alleging improper motive or malice to defeat head-on the official's asserted defense of qualified immunity. On the other hand, neither *Harlow* nor the Court's other immunity decisions have squarely resolved a related issue, *i.e.,* whether a plaintiff's allegation of improper motive or malice as an element of the claimed constitutional violation indirectly negates the official's asserted immunity

defense. See Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation,* 95 Yale L.J. 126, 134-147 (1985). Some constitutional claims involve the actor's state of mind as an element of the cause of action. See, *e.g., Branti* v. *Finkel,* 445 U.S. 507, 513-517 (1980) (First Amendment prohibits federal official's firing of subordinate because of his political affiliation). *Harlow* could be read to preclude any *Bivens* claim that necessarily involves inquiring into an official's state of mind (or at least to preclude those claims that turn on proof of improper motive).

The lower courts, however, have taken a different approach. See, *e.g., Rakovich* v. *Wade,* 850 F.2d 1179, 1210 (7th Cir. 1987) (en banc), cert. denied, 488 U.S. 968 (1988); *Hobson* v. *Wilson,* 737 F.2d at 29-30. They have struck the balance by allowing plaintiffs to pursue *Bivens* actions where improper motive is an element of the claim, while insisting that once the defendant has asserted his right to immunity, the plaintiff may proceed with the litigation only if he supports his allegation of improper motive with sufficient precision and factual specificity.

As recognized in *Harlow,* "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." 457 U.S. at 816; see *Malley* v. *Briggs,* 475 U.S. 335, 341 & n.4 (1986). And issues surrounding an official's motivation—"questions of subjective intent"—"so rarely can be decided by summary judgment." *Harlow,* 457 U.S. at 816; see *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 256 & n.7 (1986). For those reasons, the Court has refused to allow a plaintiff to defeat immunity with "bare allegations of malice." *Harlow,* 457 U.S. at 817. The same reasoning obtains where improper motivation is an element of the plaintiff's cause of action.

Since the issue of the official's improper motivation is—by definition—subjective, mere conclusory allegations of malice, without more, could automatically usher officials into discovery. But that state of affairs would undermine the purpose of qualified immunity—to afford an "entitlement [to] an *immunity from suit*." *Forsyth,* 472 U.S. at 526. Indeed, to permit such an end run around the immunity doctrine would contravene this Court's directive that "[u]ntil [the] threshold immunity question is resolved, discovery should not be allowed." *Harlow,* 457 U.S. at 818. In other words, "[t]he result would be precisely the burden *Harlow* sought to prevent." *Hobson* v. *Wilson,* 737 F.2d at 29.[12]

A bare, conclusory allegation of improper motivation as an element of a constitutional claim may not be permitted to trump the substantive protection accorded by the immunity doctrine. See, *e.g., Pueblo Neighborhood Health Centers, Inc.* v. *Losavio,* 847 F.2d 642, 649 (10th Cir. 1988); *Elliott* v. *Perez,* 751 F.2d at 1482; *Hobson* v. *Wilson,* 737 F.2d at 29-30. As the D.C. Circuit has correctly held:

> [S]ome factual allegations must support claims of unconstitutional motive. Plaintiffs who fail to allege any specific facts to support a claim of unconstitutional motive cannot expect to involve Government actors in protracted discovery and trial.

Id. at 30. Thus, in order to reach the discovery stage, a plaintiff must allege "specific and concrete facts that raise a genuine issue as to the objective reasonableness" of the official's challenged conduct. *Smith* v. *Nixon,* 807 F.2d 197, 201 (D.C. Cir. 1986) (Scalia, J.).[13]

[12] For that reason, petitioner's assertion (Br. 20-22) that the mere allegation of malice as an element of the constitutional claim defeats the official's asserted immunity cannot be squared with *Harlow* and this Court's treatment of the qualified immunity doctrine.

[13] Petitioner's amicus contends (ACLU Br. 11-14) that the court of appeals erred in holding that a plaintiff may not show improper motivation by circumstantial, as opposed to direct, evidence. To be sure, the court of appeals did say that "unconstitutional motive * * * must be pleaded with specific discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent." Pet. App. 14a. But as this Court has recognized, "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence," *Holland* v. *United States,* 348 U.S. 121, 140 (1954), and we do not think the court of appeals' opinion, which focused primarily on the conclusory nature of petitioner's assertions, must be read to conflict with that holding. Nor is any distinction between "circumstantial" and "direct" proof, as those terms are understood in the law of evidence, necessary to the resolution of this case.

In our view, the heart of the court of appeals' analysis was that once the defendant has raised the immunity issue, the plaintiff may not rely solely on subjective allegations (*e.g.*, the defendant disliked or resented the plaintiff and therefore his unfavorable recommendation was false and malicious), attenuated inferential and circumstantial allegations (*e.g.*, the defendant is a Democrat and therefore fired the plaintiff because he was a Republican), or otherwise conclusory allegations (*e.g.*, the defendant's actions show his malice), to support a claim of improper motive. Rather, the plaintiff must set forth *objective* facts that are "specific and concrete" and "raise a genuine issue as to the objective reasonableness" of the defendant's conduct. *Smith* v. *Nixon,* 807 F.2d at 201. That analysis, for the reasons set forth above, is dictated by the purposes and scope of the qualified immunity doctrine.

C. The Federal Rules Of Civil Procedure Do Not Preclude A Requirement That, Once The Defense Of Qualified Immunity Is Raised, The Plaintiff Must Set Forth Essential Facts Regarding A Claim Of Malice With Sufficient Precision To Negate The Defense

Contrary to petitioner's contention (Br. 23-24), the pertinent Federal Rules of Civil Procedure in no way preclude the court from requiring the plaintiff in a *Bivens* action—once the defendant has asserted his immunity—to set forth essential facts regarding the government official's malice with sufficient precision to negate the immunity. Indeed,

such a requirement follows from this Court's directive that a "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz,* 438 U.S. at 508.

1. Under Fed. R. Civ. P. 8(a), the plaintiff must set out in his complaint "a short and plain statement of the claim" showing that he is entitled to the relief sought. The purpose of this rule is to provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson,* 355 U.S. 41, 47 (1957). Accordingly, the rule mandates that "the [plaintiff] disclose adequate information concerning the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1215, at 145 (1990).

The requirement of factual specificity once the defendant asserts immunity—the so-called "heightened pleading" standard, see, *e.g., Brown* v. *Frey,* 889 F.2d at 170— is a sound application of the mandate of Rule 8 that the plaintiff show his entitlement to the relief sought. Requiring the plaintiff to make such a showing thus amounts to nothing more than the "firm application" of Rule 8 that this Court's decisions demand. See, *e.g., Harlow,* 457 U.S. at 819-820 n.35; *Butz,* 438 U.S. at 508.

Indeed, to tolerate conclusory allegations in these circumstances would be to adopt the "sue now, discover if you have a claim later" approach to litigation. See *Martin* v. *D.C. Metropolitan Police Dep't,* 812 F.2d 1425, 1430 (D.C. Cir. 1987). That approach would be wholly inconsistent with the proper scope of *Bivens* actions, in which federal officials are put individually at risk, thus potentially "undermin[ing] the effectiveness of government as contemplated by our constitutional structure." *Harlow,* 457 U.S. at 819-820 n.35. As the Tenth Circuit recently

observed, allowing *Bivens* actions to become "fishing expedition[s] * * * would defeat the rationale for the qualified immunity defense." *Sawyer* v. *County of Creek,* 890 F.2d at 668.

2. Rule 9(b) provides that "[m]alice * * * and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). Accordingly, where the defendant's state of mind is an element of the constitutional cause of action, the plaintiff may plead that state of mind in general terms in his complaint. But once the defendant asserts his qualified immunity and moves for summary judgment (or dismissal) on that ground, the landscape has substantially changed.

First, where (as here) the motion is one for summary judgment, Rule 9(b) does not govern the disposition of such a motion under Fed. R. Civ. P. 56. In order for the plaintiff to overcome the official's claim of immunity and to proceed with the litigation, he must present specific, concrete facts supporting the general averment of malice or other improper motive in his complaint. Indeed, Rule 56(e) provides that a party against whom summary judgment has been sought "may not rest upon the mere allegations or denials of the adverse party's pleading," and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see *Lujan* v. *National Wildlife Fed'n,* 110 S. Ct. 3177, 3188-3189 (1990). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).[14]

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[14] A plaintiff who is unable to make the required showing can resist summary judgment only by filing an affidavit under Fed. R. Civ.

Second, when a defendant has asserted qualified immunity and moved either for summary judgment under Rule 56 or for dismissal under Rule 12, the defendant's *substantive* right of qualified immunity requires the plaintiff to present specific, concrete facts supporting his general averment of malice or other improper motive. The entitlement to immunity from suit—and the attendant shield against the burdens of discovery and further proceedings until the court resolves the threshold issue of immunity—

P. 56(f) specifying why discovery is necessary. As the Tenth Circuit has explained,

> in response to a summary judgment motion based on qualified immunity, a plaintiff's 56(f) affidavit must demonstrate "*how* discovery will enable [him] to rebut a defendant's showing of objective reasonableness" or, stated alternatively, demonstrate a "connection between the information he would seek in discovery and the validity of the [defendant's] qualified immunity assertion."

Lewis v. *City of Ft. Collins*, 903 F.2d 752, 758 (1990) (quoting *Jones* v. *City and County of Denver*, 854 F.2d 1206, 1211 (10th Cir. 1988)).

In this case, no such affidavit was submitted. Moreover, this Court's statement in *Creighton*, 483 U.S. at 647 n.6—that in certain circumstances discovery "tailored specifically to the question of [the defendant's] qualified immunity" "may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved"—does not support additional discovery on the record presented. As the court of appeals explained (Pet. App. 18a), in *Creighton* the Court was referring to a case in which the plaintiff and the defendant presented differing versions of the defendant's conduct. See 483 U.S. at 646-647 n.6. Here, by contrast, there is no dispute that respondent composed and sent the unfavorable recommendation letter; the only disputed question is whether he did so with impermissible motivation and intent. Nothing in *Creighton* suggests that petitioner may pursue discovery—certainly not in the absence of the particular showing required by a Rule 56(f) affidavit—in the hope of garnering support for his otherwise unsupported belief that respondent sent the letter in bad faith.

would be nullified if conclusory allegations of improper motive enabled plaintiffs to proceed in the face of an assertion of immunity. In these circumstances, Rule 9(b) does not define or limit the showing that must be made to overcome the assertion of immunity. Cf. *Elliott* v. *Perez*, 751 F.2d at 1479. Nor may the Rule be invoked as a sword to cut down the substantive scope of the qualified immunity right.

Under the Rules Enabling Act, the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. 2072(b). See *United States* v. *Sherwood*, 312 U.S. 584, 589-591 (1941). If *Bivens* actions in these circumstances are to be allowed at all, the qualified immunity accorded to government officials—an immunity not only from liability but from the burdens of litigation—can be enforced effectively only by requiring specific, non-conclusory allegations of improper motivation. That enforcement, and hence the substantive right at stake, cannot be abridged by application of an otherwise valid procedural rule. Thus, to the extent there is any conflict between Rule 9(b) and the right to qualified immunity—and for the reasons stated we do not believe there is—Rule 9(b) must give way to vindication of the substantive right. Cf. *Elliott* v. *Perez*, 751 F.2d at 1479; *Morrison* v. *City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985).

D. Petitioner's Conclusory Allegations Of Malice Are Not Sufficient To Overcome Respondent's Defense Of Qualified Immunity

In this case, petitioner based his *Bivens* action on the claim that in submitting an unfavorable recommendation to his prospective employer, respondent "maliciously and in bad faith" deprived petitioner of liberty without due process of law, in violation of the Fifth Amendment. J.A.

9 (Compl. ¶ 30). Assuming, as did the court of appeals, Pet. App. 16a-17a, that the conduct alleged constituted a clearly established constitutional violation if respondent acted maliciously and in bad faith,[15] petitioner failed to allege specific and concrete facts raising a genuine issue regarding the objective reasonableness of respondent's conduct. As the court of appeals found (Pet. App. 17a), all of petitioner's allegations (see Br. 26-27) are entirely consistent with a former supervisor's good faith response to a solicited recommendation.[16]

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[15] In view of the procedural opportunities afforded to petitioner, see note 16, *infra*, we do not believe that any such violation could be established.

[16] Petitioner (Br. 17-20) and his amicus (ACLU Br. 8-11) contend that, even without any proof or allegation of malice, respondent's conduct violated a clearly established constitutional right, and thus the court of appeals erred in ordering the case dismissed. That contention—which was not presented as a question for review in the certiorari petition (Pet. i; see Br. i), was mentioned there only in passing (Pet. 19-20 n.27), and is scarcely related to the questions on which the Court granted certiorari—is not properly before the Court. S. Ct. Rules 21.1(a) and 24.1(a); see, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 438-429 (1964).

In any event, the contention is meritless. First, in order for an allegation of defamation to state a claim under the Due Process Clause, the plaintiff must sufficiently allege that the governmental actor's conduct deprived him of a protected liberty interest greater than an injury to reputation, see *Paul* v. *Davis*, 424 U.S. 693, 708-709 (1976), *and* that the actor's conduct denied him adequate process, *i.e.*, "an opportunity to clear his name," *Codd* v. *Velger*, 429 U.S. 624, 624 (1977) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 573 n.12 (1972)). Here, on the basis of petitioner's own concessions, it is evident that he had such an adequate opportunity, through the administrative review process provided by the Army and HHS, to "refute [respondent's] charges and clear [his] name." *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092, 1112 (D.C. Cir. 1985); see J.A. 7-8, 22. And petitioner may not avoid this straightforward application

Petitioner asserts that the fact that respondent called him "inept," when in past years "he had always received exemplary evaluations at Saint Elizabeths," is itself a sufficient ground for a jury to conclude that respondent "had acted maliciously." Br. 26. That assertion is makeweight. What other supervisors in the past may have thought of petitioner's performance says nothing about petitioner's work under respondent's supervision, let alone about whether respondent could, without malice, refer to petitioner's work as inept. Thus, petitioner's assertion is the sort of weak circumstantial allegation that does not overcome an official's defense of immunity.[17] Petitioner fares

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of the law by now sounding his constitutional claim in "substantive due process." Br. 17. This Court has never held that the Due Process Clause contains a substantive right—independent of the adequacy of procedures for redress—to be free from a government actor's stigmatizing defamation.

Second, respondent's conduct did not violate clearly established law, since as the court of appeals pointed out (Pet. App. 15a-16a), there were no decisions holding that a recommendation in response to an inquiry from another government agency could be actionable absent a finding of malice. Cf. *Hannon* v. *Turnage*, 892 F.2d 653, 660 (7th Cir.), cert. denied, 111 S. Ct. 69 (1990). Indeed, at common law, a party who responds to a solicitation by warning a present or prospective employer about the misconduct or bad character of an employee is generally immune from suit in the absence of malice. See, *e.g.*, *Prosser & Keeton on the Law of Torts* § 115, at 827-828 (5th ed. 1984); *Henderson* v. *Teamsters Union, Local 313*, 90 Wash. 2d 666, 585 P.2d 147 (1978); *Burdett* v. *Hines*, 125 Miss. 66, 87 So. 470 (1921).

[17] On this record, respondent's use of the term "inept" cannot bear the weight petitioner would have it carry. Petitioner admitted that he resisted his supervisor's command and that his official records showed him to have been on unauthorized leave for prolonged periods. See J.A. 19-20. Moreover, respondent was not alone in taking a dim view of petitioner's performance. HHS considered his work unacceptable and therefore officially proposed firing him. See J.A. 15; see also J.A. 21.

no better in trying to show malice by asserting that respondent's letter failed to respond to the "credential information request form." Br. 27. The request form, by its plain language, asks for "all information on job performance and privileges granted while [petitioner] was a member of [St. Elizabeth's staff]." Pet. App. 55a. A response evaluating petitioner's performance during the past year was clearly within the scope of petitioner's request.

Petitioner next asserts that his "conflicts with [respondent] as to how the behavior modification program should be run" shows the source of respondent's malice. Br. 27. Those "conflicts," as petitioner concedes, were of his own making, since he "resisted" respondent's "attempts to modify some aspects of the * * * program." J.A. 20. As petitioner admits, he balked at respondent's supervision on the basis of a self-proclaimed superior knowledge about behavior therapy. *Ibid.* Thus, the "conflict" petitioner alleges is entirely consistent with an accurate, good faith report on the employee's performance and does not cast doubt on the objective reasonableness of respondent's conduct.

Petitioner also relies on his allegation that respondent "resented [his] absence for several months." Br. 27. Petitioner based that allegation, however, solely on his "understanding." J.A. 20. Such a conclusory statement about respondent's state of mind, in the absence of concrete, objective facts, amounts to nothing more than a faint-hearted attempt to bolster one conclusory statement (that respondent was malicious) with another (that respondent was resentful).

In any event, petitioner admits that his official records noted that he was "AWOL" for a considerable period of time. J.A. 19. Although petitioner alleges that the Worker's Compensation Board later compensated him for the leave time, petitioner has not alleged that respondent knew

of the Board's decision when he wrote the recommendation letter. To the contrary, petitioner alleged that "[h]ad [respondent] made a simple inquiry * * *, he would have discovered that [petitioner] had been fully compensated for the periods during which [respondent] apparently considered him 'AWOL' and which apparently was the cause of [respondent's] belief that [petitioner] was 'untrustworthy,' *inter alia*." Pet. Mem. in Support of Opp. to Resp. Mot. to Dis., *supra*, at 12. Accordingly, the undisputed facts and petitioner's own allegations portray a supervisor who could have honestly believed that his former employee had been away from his hospital post without authorization. These allegations are consistent with a strongly worded, adverse recommendation written in good faith, and thus do not undermine the objective reasonableness of respondent's conduct.[18]

In sum, as the court of appeals found, petitioner's allegation of malice was "unsupported by any evidence beyond innuendo." Pet. App. 17a. The crux of petitioner's evidentiary submission is that since respondent considered petitioner a poor employee because of his resistance to the orders of his supervisor and his unexplained absences from work, respondent's unfavorable recommendation must have been malicious. The flaw in this reasoning lies

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[18] Petitioner also contends (Br. 27) that the allegedly defamatory statement itself – respondent "consider[ed] [petitioner] to be both inept and unethical, perhaps the least trustworthy individual [he has] supervised," J.A. 6 (Compl. ¶ 11) – shows malice. That single statement from respondent's recommendation letter, although using frank language, does not in itself raise any doubt about the accuracy of respondent's opinion or the objective reasonableness of respondent's conduct. Cf. *Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. 2695, 2709-2710 (1990) (Brennan, J., concurring). And taken in the context of this record, respondent's statement is entirely consistent with an obligation of good faith.

in the fact that it is entirely consistent with an obligation of good faith to issue a frank, unfavorable recommendation about a former employee who does not follow orders and does not appear for work. Accordingly, the court of appeals correctly held that petitioner's allegations of malice did not sufficiently negate the defense of qualified immunity to permit him to proceed with this *Bivens* action.

II. SINCE RESPONDENT ACTED IN THE PERFORMANCE OF A DISCRETIONARY FUNCTION, HIS CONDUCT DOES NOT FALL OUTSIDE THE SCOPE OF THE QUALIFIED IMMUNITY DEFENSE

Under the doctrine of qualified immunity, a federal official is entitled to that defense when he acted "in the performance of discretionary, but not ministerial, functions." *Davis* v. *Scherer*, 468 U.S. 183, 196 n.14 (1984); see, *e.g.*, *Harlow*, 457 U.S. at 816. As this Court has made clear, "the scope of the 'ministerial duty' exception to qualified immunity" is narrow. *Davis*, 468 U.S. at 196 n.14. In particular, "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority." *Id.* at 197 n.14.[19]

Here, contrary to petitioner's submission (Br. 27-29), respondent's conduct is precisely the sort of discretionary decisionmaking protected by the doctrine of qualified immunity. Providing information about the job performance

[19] Petitioner's reliance (Br. 28-29) on *Westfall* v. *Erwin*, 484 U.S. 292 (1988), is off the mark. In *Westfall*, this Court held that a federal employee sued for damages on a common law tort theory is not entitled to absolute immunity from suit unless the challenged conduct is discretionary in nature. *Id.* at 297-298. That holding has no bearing here because the question of absolute immunity from common law claims is not at issue. See also note 5, *supra*. In any event, this Court has never suggested, in *Westfall* or any other decision, that the discretion standard applicable to claims of absolute immunity obtains in the qualified immunity context.

of a subordinate employee necessarily entails judgment and discretion, and petitioner does not allege that respondent acted contrary to any specific statutory or regulatory directive. Indeed, the common law provides a qualified privilege to a person who responds to a request to evaluate a former employee because of the importance and subjective nature of such communications. See note 16, *supra*. And the record belies petitioner's assertion that "responding to the [Credential Information Request] Form involved a purely administrative function of locating, copying and sending documents referred to by the Form." Br. 28. The request sought "all information on [petitioner's] job performance." Pet. App. 55a. Such a sweeping request for information—in the context of enabling the Army to assess petitioner's fitness to serve as a psychologist at one of its hospitals—does not at all preclude an evaluation of petitioner's job performance by his previous supervisor.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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